United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1541

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

E. GARRISON ST. CLAIR,

Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District Of New York

APPELLANT'S BRIEF

HARVEY J. MICHELMAN
MICHELMAN & MICHELMAN
Attorneys for Defendant-Appellant
250 West 57th Street
New York, N.Y. 10019
(212) 586-1410

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

TABLE OF CONTENTS

TABLE OF CONTENTS CONT'D

Page

(P. 44); that she printed 5,000 each of business reply envelopes;

TABLE OF CASES

AUTHORITIES AND STATUTES

Other Authorities

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

Docket No. 76-1541

UNITED STATES OF AMERICA,

Appellee,

v.

E. GARRISON ST. CLAIR,

Defendant-Appellant.

----------x

On Appeal from the United States District Court
for the Eastern District of N.Y.

PRELIMINARY STATEMENT

The defendant was convicted in the United States District Court, Eastern District of New York, after trial before the Hon. George C. Pratt and a jury of twelve on five counts of mail fraud (Title 18 U.S.C., Section 1341) and two counts of obstructing justice (18 U.S.C. 5001), and sentenced as follows:

(a) As to the mail fraud counts, a term of two years in a jail-type or treatment-type of institution for a period of six months, the balance of 18 months suspended and the defendant placed on probation for a period of three years to commence upon release from custody.

(b) As to the obstruction of justice counts, three years in a jail-type institution for a period of six months, the balance

of the jail sentence to be suspended and the defendant to be placed on probation when the defendant is released from confinement.

The sentences on the mail fraud counts to run concurrently with each other, the sentences on the obstruction of justice to run concurrently with each other but consecutive with the concurrent sentences for the mail fraud, and the commencement of the probation period when the defendant is released from custody.

In essence, Title 18 U.S.C., Section 1341, proscribes that a person is guilty of mail fraud when, by use of the mails, he enters into a scheme to defraud or obtain money by false pretenses.

Title 18, U.S.C., Section 1510, proscribes that:

> " ... by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigation ..."

The defendant reserved from the Secretary of State of Delaware the corporate name, President's Publishing Systems, Inc. He then caused to be printed 3,000 sets of five-copy invoices, return envelopes, solicitation letters and window envelopes bearing the legend "Accounts Payable". The defendant claims that he and three women, Ms. Rojas, Ms. Claire, and Mrs. Hopper stuffed window envelopes with the three other items on December 19, 1975, and that thereafter he mailed them to 2,750 businesses throughout the United States.

A few weeks thereafter the postal service received complaints about the mailings. On January 8, 1976, Postal Inspector

Thomas Johnson stopped the defendant's mailings. On January 23, 1976, the defendant consented to the government's obtaining of a restraining order preventing the defendant from further transacting his business. On the same day the government interviewed the defendant and received from the defendant or his attorney the names of the companies to which the mail was sent, the names of the persons who helped to stuff the envelopes, and the printer who supplied the printed material.

Thereafter, and on January 26, or January 29, 1976, the government and the defendant entered into a Consent Agreement permanently restraining the defendant from transacting his business in consideration of the government's promise not to proceed against the defendant under Title 36 U.S.C., Section 3005.

Postal Inspector Johnson, upon his investigation concluded that the notice of solicitation was not included with the sending of the invoices. Upon questioning Ms. Claire and Mrs. Hopper, they denied helping the defendant stuff the aforesaid envelopes, but indicated that the defendant requested them to lie in stating that they had stuffed envelopes when they claimed that they had not.

The defendant was thereafter indicted by the Grand Jury and charged with six counts of mail fraud, one of which was withdrawn by the government, and three counts of obstructing justice, one of which was dismissed by the Court.

The defendant moved to suppress the evidence given by him to the government, consisting of the names of companies to which the mailings had been sent, the firms which printed his material, the

people who stuffed the envelopes with him, and the firms which he contacted for the future publication of his company, upon the grounds that he had not knowingly and intelligently waived his rights against self-incrimination. On July 26, 1976, the Court, by the Honorable George J. Pratt, D.J., after a hearing with respect to the motion to suppress, denied said motion.

Thereafter, the trial on the indictment was commenced.

ISSUES PRESENTED

1. Did the defendant's conduct constitute a violation of Title 18 U.S.C. 1341?
   (a) Is the mailing of invoices that do not state on their face that they are solicitations to purchase criminally punishable or solely civilly prohibited?
   (b) Absent proof of a specific intent to defraud, can the defendant be convicted of violating 18 U.S.C. 1341?
2. Whether the Court below should have set aside the jury's verdict convicting the defendant when there was insufficient evidence to sustain the conviction?
   (a) Whether by proving that only five companies out of 2750 did not receive the notice of solicitation, did the government sustain its burden of proving that the notice of solicitation was not at all sent in order to prove a fraud on the part of the defendant?
   (b) Whether persons who did not receive the defendant's mail were competent to testify about its receipt by their respective companies?

3. Whether the District Court erred in instructing the jury that the jury could find that the defendant could be found guilty of mail fraud by not furnishing proof sheets when the government had stopped defendant's mailings before the same could be sent out?

4. Did the District Court err in failing to dismiss the indictment and reverse the jury's verdict finding the defendant guilty of obstruction of justice?

   (a) Where the defendant's conduct was civilly prohibited rather than criminally punishable, can interference with witnesses be construed as a violation of Title 18 U.S.C. 1510?

   (b) Can a criminal statute be construed to have a meaning beyond the Congressional intent?

   (c) Where the government fails to prove that the defendant tried to prevent the communication by witnesses with a government agent, can a conviction of the defendant for obstructing justice be sustained?

5. Did the District Court err in failing to suppress the evidence given by the defendant to the government in violation of his Fifth and Sixth Amendment rights?

THE INDICTMENT

Counts 1-6 charged the defendant with violation of 18 U.S.C. 1341 in that it alleged that the defendant knowingly and lawfully devised a scheme, etc., to obtain monies from various corporations and other commercial entities by means of false and fraudulent pretenses, representations and promises, knowing at the time they were made that

they were false and fraudulent.

Count I - Addressee - Barbara Lynn Stores, Inc.

Count II - Addressee - Amerace Corporation

Count III - Addressee - I.C.M. Realty

Count IV - Dismissed

Count V - Addressee - Topps Chewing Gum, Inc.

Count VI - Addressee - Interstate Stores

Counts 7-9 charged the defendant with willfully endeavoring by means of misrepresentation to obstruct, delay and prevent the communication of information relating to the violation of a criminal investigator (Postal Inspector) by each of the following persons:

Count VII - Kari Hopper

Count VIII - Mary Anne Claire

Count IX - Evangelina Rojas (dismissed)

MOTIONS PRIOR TO TRIAL

Motion to Suppress

The defendant moved the Court to suppress all statements given by him to the government during an interview with the United States Attorney's Office upon the grounds that he did not make a knowing and intelligent waiver of his rights against self-incrimination by virtue of the following:

(a) The defendant believed that all matters pending between himself and the government relating to his solicitation for subscriptions to his future publication of a commercial directory were completed with his consenting to a restraining order against his business;

his execution of a consent agreement for the permanent cessation of his business; Judge Weinstein's statement in Court to the effect that there was no further need for criminal prosecution, all coupled with the professional incompetency of his then attorney in the latter's failure to advise the defendant of his right to remain silent and that statements made by the defendant could and would be used against him in a criminal proceeding.

The Court denied the motion to suppress the evidence.

FACTS BELOW

The defendant was convicted in the United States District Court for the Eastern District of New York after trial before the Hon. George C. Pratt and a jury of twelve of five counts of mail fraud (18 U.S.C. 1341) and two counts of obstructing justice (18 U.S.C. 5001) and sentenced on the conviction. Title 18 U.S.C., Section 1341, proscribes in essence that a person is guilty of mail fraud, when, by use of the mail, he enters into a scheme to defraud or obtain monies by false pretenses.

Title 18 U.S.C., Section 1510, proscribes that:

> " ... by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigation ..."

With respect to the mail fraud counts in the indictment, the following witnesses testified to the following facts:

1. Patricia Stackhouse stated that she was the Assistant Purchasing Manager for Interstate Stores and sat in as secretary to

the President (P. 31); that she received an envelope addressed to Accounts Payable, together with an invoice for a listing in the defendant's directory and a return envelope bearing the defendant's return address, which came to her after having gone to the mailroom and the Accounts Payable Department (Pp. 32-34); and that the invoice was never paid (P. 35). She also testified that she could not state positively that the covering letter of solicitation was not enclosed (P. 36).

2. Donald Reef testified that he was the Vice President and Controller of Topps Chewing Gum, Inc. (P. 38); that he received the defendant's invoice (P. 38); that he marked it "do not pay without my signature"; that he received such invoice third-hand after it had come through the mailroom and Accounts Payable Department (P. 41); and that he could not state that his company did not absolutely receive defendant's covering letter of solicitation.

3. Richard Selenka testified that he was the Executive Vice President of Barbara Lynn Stores, Inc. (P. 108); that he received the defendant's invoice after it came to him from the mailroom and Accounts Payable Department (P. 113); that he could not positively state that he never saw the defendant's covering letter of solicitation.

4. Ronald J. Scotto testified that he was employed by the Kings Corporation (not mentioned in the indictment); that he was the Corporate Accounting Manager (P. 121); that the mail was received by the receptionist, sent to Accounts Payable, and then reached him (P. 122); that he received the defendant's invoice but that he could not state beyond any doubt that the defendant's covering letter of

solicitation was not included with the invoice (P. 123).

5. William Graves testified that he was Bookkeeper for the Amerace Corporation (P. 123); that he received the defendant's invoice which he received from his secretary which she received from the mailroom; that his company paid the invoice and that he could not state whether his company received a refund (P. 128); that he could not state what was contained in the envelope received by his company (Pp. 129-130).

6. Kenneth Brooks testified that he was the Controller of I.C.M. Realty (P. 68); that he received the defendant's invoice after it had been handled by the receptionist, accounts payable and the company's treasurer (Pp. 71-72); that he paid the invoice and received no proof sheets; that he could not state positively that the defendant's covering letter of solicitation was not in the envelope with the defendant's invoice (P. 72).

7. Roy McMillan testified that he was in charge of Public Relations for Todd Shipyards, Inc. (P. 74); that he received the invoice (P. 74); that Todd's mail is first gotten at the Post Office and then handled by the mailroom (P. 78); that it is then opened by the manager of office services (P. 79); that he did not know of his own knowledge what was in the envelope when it was opened.

None of the above witnesses were present when the mail was opened and their testimony was objected to on the grounds of hearsay, which objection was overruled.

8. Florence Gabler testified that she was self-employed by A-1 Duplicating Service which was in the business of off-set printing

(P. 44); that she printed 3,000 each of business reply envelopes, window envelopes and covering solicitation letters (P. 46); that the letters were single-folded (P. 48); that she gave the defendant the courtesy of using her postage machine for which he paid (P. 49); that she did a "mock-up" for an invoice but did not print the same as the defendant required multi-copies on NCR (copy paper without carbon) (P. 53); that she was questioned by Postal Inspector Johnson in an authoritarian manner (P. 55); that the defendant had told her that some of the girls from the building helped him stuff the envelopes (P. 57).

9. Evangelina Rojas, whom the government called, testified that she lived with the defendant for one year (P. 81); that Postal Inspector Johnson asked her if she had helped the defendant stuff envelopes and that she stated had with Ms. Claire and Mrs. Hopper (Pp. 81-82); that the envelopes were stuffed with the invoice, the return envelope, and the covering letter of solicitation (P. 82); that in late January 1976, the defendant told her that Mr. Johnson was going to call her to clear some things up (P. 83).

10. Postal Inspector Johnson stated that he was assigned to investigate President's Publishing Systems, Inc., in January 1976 (Pp. 130-31); that he contacted Mrs. Gabler to ascertain who had used her postal meter to mail the invoices (P. 132); that he ascertained that the defendant had used her meter to send out the invoices (P. 133); that thereafter he was contacted by the defendant by telephone and that an appointment was arranged but never kept (P. 136). It was conceded by the government that on January 8, 1976, Mr. Johnson unilaterally

It is axiomatic that the government, in establishing

stopped the defendant's mailings. He also testified that after the temporary restraining order was consented to by the defendant in Court, the defendant and Mr. Sands, his then attorney, went to the United States Attorney's Office where Mr. Johnson was supplied with the following information:

(a) The list to whom the mailings were sent;

(b) That President's Publishing System, Inc., was incorporated in Delaware; and

(c) That the covering envelopes were stuffed by Ms. Rojas, Ms. Claire and Mrs. Hopper (P. 137).

Postal Inspector Johnson further testified that he interviewed Ms. Rojas and that on December 19, 1975, she and Ms. Claire and Mrs. Hopper stuffed the envelopes with invoices, return envelopes and the covering letter of solicitation (PP. 140-41); that he tried to see Mrs. Hopper and Ms. Claire by visiting their apartment a number of times and by leaving a business card requesting them to contact him, by sending a certified letter which was returned unanswered, and by finally contacting American Airlines, where the witnesses worked (P. 143); that after he contacted their employer and threatened to prevent disembarkation on an international flight, they immediately called him and he interviewed them (Pp. 144-45); that he asked the witnesses where they helped stuff the envelopes in question to which they replied in the negative, but that they told him the defendant had asked them to state that they did (Pp. 146-47).

11. Kari Hopper testified that she was a flight attendant for American Airlines (Pp. 170-71); that she was a friend of the defendant (P. 171); that on January 23, 1976, the defendant stated to both she and Ms. Claire that somebody would come and discuss some questions

with them (P. 172); that the defendant requested that she state that she put a bill, a return envelope, and a letter into a covering envelope for the defendant, but, in fact, she had never done any stuffing for the defendant (Pp. 173-74). Ms. Hopper emphasized that the defendant never indicated that the "someone" who would call was a postal inspector or governmental investigator.

12. Mary Anne Claire testified that she was a flight attendant for American Airlines (P. 192); that she was a good friend of the defendant; that the defendant stated that someone would contact her and wanted her to state that she had stuffed return envelopes, letters and invoices into covering envelopes; that the defendant did not state who the person was, who would contact them, or what position he held, if any (Pp. 194-95); and that she did not comply with the defendant's request and told him so (P. 199).

Neither of the witnesses testified that the defendant had urged them not to speak to the person who would contact them, nor did he misrepresent the importance or lack of importance of the matter. Both of the witnesses told Inspector Johnson their version of the facts, notwithstanding the defendant's alleged requests.

The above constitutes the essential evidence adduced upon the trial in the District Court upon which the jury found its verdict. The defendant respectfully states, among other things, that the same was insufficient to sustain said verdicts of guilty, and that the conviction below should be reversed.

POINT I

THE DISTRICT COURT ERRED IN FAILING TO DISMISS THAT PART OF THE INDICTMENT CONTAINING FIVE MAIL FRAUD COUNTS AGAINST THE DEFENDANT UPON THE GROUNDS THAT SAID COUNTS FAILED TO CHARGE THE DEFENDANT WITH VIOLATION OF 18 U. S. C. SECTION 1341.

A. Congressional intent clearly indicates that the defendant's conduct does not establish a violation of 18 U.S.C., Section 1341, but, rather, only gives rise to a civil cause of action.

It has become axiomatic in most courts that Section 1341 should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress. United States v. McNeive, 536 F. 2d 1245, 1247 n. 3 (8th Cir. 1976); United States v. Staszcuk, 502 F. 2d 875 (7th Cir. 1974), rev'd in part, 517 F. 2d 53 (en banc), cert. denied, 397 U.S. 952 (1970). Clearly, Congress had evidenced its intent that the defendant's conduct did not constitute a violation of the mail fraud statute but merely gave rise to a civil cause of action.

39 U.S.C., Section 3001(a)[2] originally provided that:

> "Matter the deposit of which in the mails is punishable under Section ...1341... of Title 18 is nonmailable."

Subdivision (b) then established the postal service remedy. Congress, subsequently realizing the limited scope of Section 1341, then amended

---

2 originally entitled 39 U.S.C., Section 4001, Pub. L. 86-682, 74 Stat. 654 (Sept. 2, 1960).

39 U.S.C., Section 4001, with subdivision (d) providing that:

> "(d) Matter otherwise legally acceptable in the mails which ----
>
> "(1) is in the form of, and reasonably could be interpreted or construed as, a bill, invoice, or statement of account due; but
>
> "(2) constitutes, in fact, a solicitation for the order by the addressee of goods or services, or both;
>
> is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs, unless such matter bears on its face, in conspicious and legible type in contrast by typography, lay-out, or color with other printing on its face, in accordance with regulations which the Postal Service shall prescribe------
>
> "(A) the following notice: 'This is a solicitation for the order of goods or services, or both, and not a bill, invoice, or statement of account due. You are under no obligation to make any payments on account of this offer unless you accept this offer.'; or
>
> "(B) in lieu thereof, a notice to the same effect in words which the Postal Service may prescribe." 39 U.S.C., Section 3001(d) (1970).

Thus, if the business practice of sending invoices without notices of solicitation constituted mail fraud under Section 1341, it would be deemed nonmailable under subdivision (a) of 39 U.S.C., Section 3001, and Congress would have had no need to later enact subdivision (d) to establish such mailings as nonmailable matter.

Congressional debates also support this construction. The remarks of Representative Henderson indicates that subdivision (d) was the first and only congressional action taken to regulate such conduct when he stated that it is this section which "makes any such solicitation nonmailable, and prohibits its carriage or delivery through the mails, if it is in the form of, and reasonably could be interpreted or construed as a bill, invoice or account due...". Remarks of Rep. Henderson, 113 Cong. Rec. 28414 (Oct. 10, 1967). In addition, the congressional intent establishes that conduct falling under subdivision (d) of 39 U.S.C., Section 3001, would establish a civil cause of action only. Congress based 39 U.S.C., Section 3001 (d) on California's law regulating such conduct which merely gives rise to a civil cause of action for treble damages. Calif. Civ. Code, Section 1716. See Remarks of Rep. Henderson, 113 Cong. Rec. 28414 (Oct. 10, 1967). Accordingly, 39 U.S.C., Section 3001, sets forth the sole remedy for engaging in the business practice of sending invoices without a notice of solicitation.

This Honorable Court has recently stated in United States v. Dixon, 536 F. 2d 1388 (2d Cir. 1976) that:

> "While it has been said that the mail fraud statute 'continues to remain an important tool in prosecuting frauds in those areas where legislation has been passed more directly addressing the fraudulent conduct', United States v. Maze, 411 U.S. 395, 406 (1974) (Burger, C. J., dissenting), there is no justification ... for straining to read it beyond the ordinary meaning of the language." Id. at 1398.

Mindful of Chief Justice Burger's dissent in United States v. Maze, 411 U.S. 395 (1974), in which he stated that "the mail fraud statute becomes a stop-gap device to deal on a temporary basis with this new phenonemon, until particularlized legislation can be developed..." Id. at 405-06, (Burger, C. J., dissenting) (emphasis supplied), where Congress clearly indicates that the defendant's conduct will be regulated as a civil matter, "(t)here is no ... need to use the mail fraud statute as a 'stop-gap device' ... for Congress has enacted legislation that affords adequate protection of the public interest...". United States v. Henderson, 386 F. Supp. 1045, 1053 (D. Mont. 1975).

On January 26, 1976, the defendant in the case at bar, entered into a Consent Agreement with the government to cease his practice. (p. 155). In addition, he voluntarily refunded all monies remitted to him by reason of the solicitations even though said refunds were not provided for in said Consent Agreement, nor was it in any manner required, expressly or implied (See Consent Agreement). As the government pursued its sole remedy against the defendant civilly, there is no violation of the criminal statutes, and, therefore, the indictment should have been dismissed and the conviction of the defendant reversed.

B. The defendant's conduct did not constitute "a scheme to defraud" or obtaining money by false pretense within the prohibition of 18 U.S.C. Section 1341.

The trial record will disclose that the defendant reserved with the Secretary of State of Delaware the corporate name "President's Publishing Systems, Inc. (P.P.S.I.) without ever filing the corporate certificate. (Pp. 139, 145).

Under the P.P.S.I. name defendant mailed out 2750 solicitations to various large companies throughout the United States for the purpose of getting subscriptions to a commerical directory which was to be printed at a later date. (P. 50). The government contended that the mailings consisted solely of invoices not containing a notice that the same were solicitations in the first instance, rather than billings for previously ordered listings. To reinforce this theory, the government proved that the mailings were sent in window envelopes directed to "accounts payable". (Exhibit 1 in evidence- p. 32). There was a question as to whether the invoices were sent with a covering letter explaining that the mailing was in fact a solicitation.

The defendant's position is that whether or not notices of solicitation were sent with the invoices, the fact that he intended to publish the directory at a later date and the government's failure to affirmatively prove the contrary, negated any intent to defraud as required for a conviction under 18 U.S.C., Section 1341.

To the contrary, Mrs. Gabler, a government witness, testified that the defendant had a conversation with her husband who was doing printing for the defendant, inquiring as to whether Mr. Gabler could handle the printing of the President's directory (Pp. 57-58). Additionally, Postal Inspector Johnson testified that the defendant told him that the defendant contemplated using Mastercraft Printers in connection with P.P.S.I. (P. 169).

Defendant's original mailings were sent out after December 19, 1975 (p. 140) and after receiving complaints, Postal Inspector Johnson stopped defendant's mail on January 8, 1976, a period of nineteen (19) days including three (3) weekends and the Christmas and New Year's holidays. Thereafter, the defendant was precluded from doing any further business in connection with the directory including the mailing of proof sheets and the production of the directory.

On trial, the government's contention was that the jury could find the defendant guilty of mail fraud if the jury found that he mailed the invoices without notices of solicitation and that he never mailed proof sheets and that the defendant never intended to publish the directory.

As stated above the government witnesses testified that the defendant inquired as to the printing of the directory and that the government unilaterally prevented the defendant's mailing of the proof sheets. However, the Assistant United States Attorney maintained that the sending of the invoices without a notice of solicitation could alone be proof of a scheme to defraud.

In direct contrast to the government's position, it has been consistently held that the mail fraud statute should not be construed to make criminally punishable conduct of sales organizations in which an "opening" approach to the potential customer includes some deception aimed only at giving the seller a better chance to receive the attention of the buyer. Instructive in This Court's ruling in the case of United States v. Regent Office Supply Co., 421 F. 2d 1174 (2d Cir. 1970), in which Judge Moore, writing for a unanimous Panel[1], held that:

> "(The) solicitation of a purchase by means of false representations not directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain (will not) constitute a 'scheme to defraud' or 'obtaining money by false pretense' within the prohibition of L* U.S.C., Section 1341..."

id. at 1179. In Regent Office Supply Co., defendants were convicted in the United States District Court for the Southern District of New York for violation of 18 U.S.C., Section 1341. The defendants in Regent, supra., had stipulated in writing that their agents secured by sales making false representations to potential customers that, inter alia, the agent was a doctor, or other professional person, who had goods to be disposed of, or that goods of friends of the agent had to be sold because of death and the customer would help to relieve the situation by purchasing the goods. Judge Moore noted that the false representations were made as a preliminary part of the salesman's solicitation and that price and quality of the merchandise was always discussed honestly. Id. at 1177. This Honorable Court refused to

---

[1] Joining Judge Moore were Judge Waterman and Chief Judge Kaufman.

hold "...that any untrue statement designed to obtain the sympathetic ear of a potential customer comes within the purview of the mail fraud statute" Id. at 1178.

Although This Honorable Court specifically pointed out that, it did not "condone the deceitfulness such business practices represent...", id. at 1179, the Court, nevertheless, held that such conduct does not consitute an offense punishable under Section 1341. Id. Other circuits faced with this issue have adopted the same view. Illustrative is Rude v. United States, 74 F. 2d 673 (10th Cir. 1935), in which the defendant was convicted of selling inferior clothing merchandise through false advertising. The Tenth Circuit reversed, reasoning that:

> "Instead of proving a scheme to sell cheap, shoddy suits as those advertised, this evidence...established a scheme to attract customers into the store by false advertising... Such a scheme does not fall within the provision of (Section 1341)..." Id. at 677 (Emphasis supplied).

The sending out of invoices without a notice of solicitation represent one of the "myriad of sales pitches used for various purposes in the diversified world of commerce". United States v. Regent Office Supply Co., 421 F. 2d 1174, 1178-79 (2d Cir. 1970). Mindful that the absence of a notice of solicitation renders the invoice deceitful, nevertheless, the misrepresentation is solely of the type designed to "get by" the bureauracy of corporate secretarial help and to get the purchasing agent's attention directed toward the offered merchandise. See Id. at 1177. To hold that such

conduct constitutes a violation of the mail fraud statute would stretch its words beyond normal bounds and the congressional intent. See United States v. Dixon, 536 F. 2d 1388, 1401 (2d Cir. 1976); United States v. McNeive, 536 F. 2d 1251 (8th Cir. 1976).

This Honorable Court noted in Regent Office Supply Co. that "there are two elements to the offense of mail fraud: use of the mails and a scheme to defraud". 421 F. 2d at 1180. See also United States v. Maze, 414 U.S. 395, 405 (1974); Pereira v. United States, 347 U.S. 1, 8 (1954); United States v. Keane, 522 F. 2d 534 (7th Cir. 1975); United States v. Greer, 494 F. 2d 820, 823 (5th Cir. 1974); Note, Survey of the Law of Mail Fraud, 1975 U. Ill. L.F. 237, 240 (1975). Accordingly, the government must prove a scheme to defraud by establishing a specific fraudulent intent on the part of the defendant. See Durland v. United States, 161 U.S. 306 (1896); United States v. Bryza, 522 F. 2d 44 (7th Cir. 1975); United States v. Prince, 496 F. 2d 1289 (5th Cir. 1974), cert. denied, 419 U.S. 1107 (1975). Thus, fraudulent schemes in which the innocent are induced to give up without consideration some tangible or intangible interest establish an offense under Section 1341. For a description of the tangible and intangible interests encompassed by Section 1341, see United States v. McNeive, 536 F. 2d 1245, 1248-49 (8th Cir. 1976). This Honorable Court, however, reasoned in Regent Office Supply Co., "(i)f there is no proof that the defendants expected to get 'something for nothing'... it is difficult to see any intent to injure or to defraud in the defendant's falsehoods". 421 F. 2d at 1181. (citations omitted). (Emphasis supplied).

Accordingly, "false representations, made in the context of a commerical transaction, are (not) per se fraudulent (in) the absence of any proof of actual injury to any customer". United States v. Regent Office Supply Co., 421 F. 2d 1174, 1181 (2d Cir. 1970). An intent to deceive does not establish an intent to defraud "where the deceit (does) not go to the nature of the bargain itself". Id. at 1182. Thus, where the false representations are not directed to the quality, adequacy, or price of the goods themselves, no fraudulent intent is established because the falsity of the representations does not affect the customer's understanding of the bargain, nor does it influence his assessment of the balue of the bargain to him. Id.

Here, the defendant, by sending out invoices without a notice of solicitation, did not attempt to deceive the prospective customers with respect to the bargain he was offering --- rather, he may have used a deceptive sales technique to offer the bargain, viz., sending an invoice without a notice of solicitation as alleged by the government. Because "ambiguity concerning the ambit of criminal statutes should be resolved in favor of leniency", Rewis v. United States, 401 U.S. 808, 812 (1971), quoted and applied in United States v. Bass, 404 U.S. 336, 347-49 (1971), it simply cannot be contemplated that Congress, by enacting the mail fraud statute, intended that a situation similar to the defendant's would be classified as a scheme to defraud. See United States v. McNeive, 536 F. 2d 1245, 1251 (8th Cir. 1976).

By reason of the foregoing:

(a) that defendant's conduct in sending invoices without notices of solicitations constituted a civil violation rather than a crime; as contemplated by Congress; and

(b) that the government failed to prove an intent to defraud on the part of the defendant,

it is respectfully submitted that the conviction of the defendant should be reversed and the indictment dismissed.

POINT II

THE JUDGMENT OF CONVICTION WITH RESPECT TO THE FIVE MAIL FRAUD COUNTS SHOULD BE REVERSED UPON THE GROUNDS THAT THERE WAS INSUFFICIENT ADMISSIBLE EVIDENCE THAT THE DEFENDANT HAD COMMITTED THE OFFENSES CHARGED OR TO SUSTAIN A VERDICT OF GUILTY BEYOND A REASONABLE DOUBT.

A. By establishing that only five companies had not received a notice of solicitation out of 2750 mailings, the government has failed to establish a fraudulent intent on the part of the defendant and a scheme to defraud.

It is firmly established that under 18 U.S.C., Section 1341, the government must establish beyond a reasonable doubt proof of a specific fraudulent intent by the defendant. See, e.g., United States v. Bryza, 522 F.2d 44 (7th Cir. 1975); United States v. Payne, 474 F.2d 603 (9th Cir. 1973). It is also well settled that the fraudulent intent necessary to constitute a scheme to defraud must involve a "systematic plan or a plan or theory of action", M. Taylor, Law of Postal Frauds and Crimes 182 (1931), to get "something for nothing" or to injure the victim. See Harrison v. United States, 200 F. 662 (6th Cir. 1912). As one commentator has stated:

> "(I)t has never yet been thought that the 'scheme to defraud' under this section could be found in a mere succession of successive swindles, unrelated save as they had a common stage, and there must be some general fraudulent scheme characterizing some part of such business." M. Taylor, Law of Postal Frauds and Crimes 186-87 (1931).

Neither an intent to defraud nor a scheme to defraud was established by proof that only five companies out of 2750 did not receive a notice of solicitation.

It is axiomatic that the government, in establishing fraudulent intent, must consider the totality of the defendant's actions. United States v. Bush, 522 F.2d 641 (7th Cir. 1975). As one court noted, fraudulent intent is established "from the modus operandi of the scheme". United States v. Reid, 533 F.2d 1255, 1264 (D.C. Cir. 1976), citing, United States v. Regent Office Supply Co., 421 F.2d 1174, 1180-81 (2d Cir. 1970). Accordingly, the government, by establishing that only five out of 2750 companies failed to receive a notice of solicitation, left too much room for the jury to engage in speculation. Bailey v. United States, 416 F.2d 1110, 1116 (D.C. Cir. 1969). Treating the evidence in a light most favorable to the prosecution, it was established that less than .2% (2/10) per cent of the solicited firms did not receive the notice of solicitation. Thus, the evidence was inconclusive at best and speculative at worst. Clearly, it should not have been submitted to the jury for its consideration as a finding of guilty could be based only on conjecture and surmisal.

Instructive for our purposes is the Sixth Circuit's decision in United States v. Rabinowitz, 337 F.2d 62 (6th Cir. 1964). There the defendant was charged with devising a scheme to defraud the public by inducing them by fraudulent representations to purchase certain sewing machines. The mail fraud conviction involved 689 purchasers of the machines. The Sixth Circuit reversed, recognizing that when, inter alia, only 14 out of 689 (2%) (two) per cent purchasers testified for the government, intent to defraud is not established. Id. at 80. Mindful, that it is not incumbent upon the government to prove each

and every allegation of a fraudulent scheme, nonetheless, it is incumbent upon the government to prove "a sufficient number ... to show that the scheme was actually set up ... ." Schaefer v. United States, 265 F.2d 750, 753 (8th Cir. 1959). See also Comments, Manual on Jury Instructions in Federal Criminal Cases, 36 F.R.D. 457, 601-04.

Consequently, by establishing that only five out of 2750 companies failed to receive the notice of solicitation, as a matter of law, the evidence is insufficient to sustain a conviction. See generally United States v. Reid, 533 F.2d 255 (D.C. Cir. 1976); United States v. Rabinowitz, 327 F.2d 62 (6th Cir. 1964); Schaefer v. United States, 265 F.2d 750 (8th Cir. 1959); McLendon v. United States, 2 F.2d 660 (6th Cir. 1924). Though the circumstances in the instant case may arouse suspicions, even grave suspicion is not enough to support a conviction under 18 U.S.C., Section 1341. Bailey v. United States, 416 F.2d 1110, 1116 (D.C. Cir. 1969). Accordingly, it is respectfully urged that the government's proof was insufficient for the jury's consideration or to sustain a conviction of the defendant.

B. The sole evidence that no notice of solicitation was included with the invoices was improperly admitted as hearsay evidence.

It is another firmly established rule under 18 U.S.C., Section 1341, that it is only proper to introduce testimony by a recipient of a solicitation that the solicitation created a fraudulent impression on the recipient himself. United States v. National Marketing, Inc., 306 F.Supp. 1238 (D. Minn. 1969). In the case at

bar, it was the leading officers of the companies who testified that no notice of solicitation was received. (P-34, 40, 70, 75, 110, 121, 125). However, it is not those officers who were the recipients of the mailings. Rather, it was the mailroom help who were the recipients, and it is only from their testimony, if it had been offered, that the government could have established that no notice of solicitation was received. Notwithstanding all of the above, which is sufficient for the granting of the reversal, the Court is respectfully directed to the responses of each of the officer-witnesses, when on cross-examination, each of them stated that they could not state beyond a reasonable doubt that the notice of solicitation was not received by their respective companies. (P-36, 43-44, 72, 80, 114, 123, 129-130).

Rule 602 of the Federal Rules of Evidence provides in pertinent part that:

> "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." J. Weinstein, Weinstein's Evidence Paragraph 602(01) (1975).

The Trial Judge must reject the evidence if "as a matter of law no trier of fact could find that the witness actually received the matter about which he is testifying". Id. at Paragraph 602(02). See also United States v. Borelli, 336 F.2d 366, 392 (2d Cir. 1964), cert. denied sub. nom, Mogavero v. United States, 397 U.S. 960 (1965); United States v. Fernandez, 480 F.2d 726, 739 (2d Cir. 1973).

The government failed to establish that the officers of the companies who testified were the actual recipients of the mailings. To the contrary, it was established at the trial that none of the

witnesses were present when the mailings were opened, and further, that said mailings were received second, third and/or fourth hand by the witnesses. (P-35-36, 43, 71-72, 78-79, 112-113, 122, 129).

Accordingly, the evidence as to receipt of said mailings was inadmissible as hearsay. Thus, the key element of proof on the government's case is lacking. Consequently, the conviction of the defendant should be reversed or in the alternative, a new trial should be ordered upon the grounds that the government failed to establish proof of a fraudulent scheme or intent to defraud.

POINT III

THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY THAT THE DEFENDANT WOULD BE GUILTY OF MAIL FRAUD IF THE JURY FOUND THAT THE DEFENDANT DID NOT INTEND TO FURNISH PROOF SHEETS OF THE CORPORATE LISTINGS FOLLOWING RECEIPT OF REMITTANCE.

The government, in attempting to demonstrate that the defendant did not intend to furnish the proof sheets, established only that two companies did not receive said proof sheets of the corporate listings (P-71,111). Clearly this evidence is grossly insufficient to establish that the defendant did not intend to furnish the proof sheets to each of the 2750 companies solicited by him for listings in the commercial directory.

It is well established that to be guilty of a crime, a person must responsibly engage in the action which constitutes the crime. Easti v. District of Colombia, 361 F.2d 50, 52 (D.C. Cir. 1966). See also Hughes v. Rizzo, 282 F. Supp. 881 (D. Pa. 1968). At the trial, Postal Inspector Johnson testified that he was informed that the envelopes were stuffed on December 19, 1975 (P-140). The envelopes were mailed subsequent to that date. Mr. Johnson further testified that he unilaterally stopped the defendant's mail on January 8, 1976, a period at a maximum of 19 days, which 19-day period included three (3) weekends and the Christmas-New Year holidays (P-156). Thus, by virtue of the government's own action, no further business involving the mailing or receipt of mail regarding the commercial directory could have possibly taken place. Consequently, the defendant could not furnish proof sheets of the listings to those companies who

ordered the aforesaid listings solely because of Inspector Johnson's action in halting the defendant's mail. Thus, it is the government who is responsible for the alleged criminal action, viz, failing to furnish proof sheets of the listings.

By reason of the foregoing, it is respectfully urged that the evidence received by the Court that the defendant failed to supply proof sheets was inadmissible since it was the government's action which prevented the defendant from mailing the same out and the convictions for mail fraud based in part upon the receipt of such evidence should be reversed as a matter of law.

POINT IV

THE INDICTMENT, WHEREIN TWO COUNTS OF OBSTRUCTION OF JUSTICE ARE CHARGED, SHOULD BE DISMISSED UPON THE GROUNDS THAT SAID COUNTS FAIL TO CHARGE AN OFFENSE AGAINST THE UNITED STATES, OR, IN THE ALTERNATIVE. THE DEFENDANT'S CONVICTION THEREFOR, SHOULD BE REVERSED.

A. Because defendant's conduct regarding the mailings did not constitute a criminal offense, defendant cannot be indicted nor convicted of obstructing a criminal investigation.

18 U.S.C., Section 1510(a), provides in pertinent part that it is a criminal offense to willfully endeavor:

> "...by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigation...". (Emphasis supplied).

For the reasons discussed in the previous points, defendant's business conduct did not constitute a criminally punishable action. Rather, defendant's conduct and practice solely involved a civil action. Therefore, defendant's communications with Mrs. Hopper and Miss Claire did not relate "to a violation of any criminal statute...". 18 U.S.C., Section 1510(a) (1975). Accordingly, the defendant's conviction of two counts of obstruction of justice should be reversed and the indictment relating thereto should be dismissed.

B. By regarding the defendant's communications as a violation of Section 1510, the government seeks to expand the scope of the statute beyond the intent of the Congress.

Mrs. Hopper and Miss Claire, formerly female acquaintances of the defendant, both testified that they had been contacted by the defendant who told them, in substance, that someone would try to get in touch with them. (P-172, 183, 213). Defendant also requested them to tell the person who contacted them that they had stuffed the envelopes with him and that they had included three items in each envelope: the invoice, a return envelope, and the crucial letter. (P-173-174, 194). Defendant did not indicate to them why the requested story was important, but simply stated that it had something to do with business (P -174). Additionally, neither of the witnesses testified that they were either intimidated or injured by the defendant's alleged communications. To hold that such conduct constitutes a violation of the Obstruction of Justice statute would stretch its words beyond the intent of Congress.

The House Committee report states that:

> "The sole purpose of the act is to protect informants and witnesses against intimidation or injury by third parties...". 1967 U.S. Code Cong. Admin. News 1760, 1762. (Emphasis supplied).

If this is the sole purpose of Section 1510, viz, to protect witnesses from intimidation or injury by third persons, then a "misrepresentation" to a witness by a defendant does not support this purpose. Congress, however, had a specific and important purpose in including "misrepresentation" as the

congressional debates subsequent to the House Committee report indicates.

While the bill, S. 676, was being debated before final passage by the House, a controversey arose as to whether "misrepresentation" should be omitted from the legislation. See Remarks of Rep. Whitner, 113 Cong. Rec. 27684 (Oct. 3, 1967). As several legislators noted "(t)he misrepresentation of facts by individuals contacted by law enforcement officers is an entirely different matter from bribery, intimidation, or the use of force to obstruct criminal investigations... The bill would be improved by striking the word 'misrepresentation'." Additional views of Basil L. Whitner and William L. Hungate to House Rep. No. 658, 1967 U.S. Code Cong. Admin. News 1765-66. Although the amendment to omit "misrepresentation" failed, Congress had clearly indicated that by not omitting "misrepresentation" from S. 676, it had only intended that provision to remain as a "weapon against organized crime". Remarks of Rep. Rogers, 113 Cong. Rec. 29406 (Oct. 19, 1967).

As Representative Cramer stated, the inclusion of the word "misrepresentation" had a "specific and important purpose..." Id. at 29404. This purpose was that in cases involving the Mafia and Cosa Nostra

> "membership in those criminal organizations alone could not necessarily be the basis of proof of participating in intimidation or threats of force and coercion, and, additionally, those are not usually the reasons for failure to obtain testimony. That failure is too often due only to a code of silence or loyalty. That is why 'misrepresentation' was put in, specifically, intentionally, and purposely, to make certain that those situations where a member of the Mafia or Cosa Nostra is involved as a witness or a procurer of a witness will be covered. And that is why 'misrepresentation' is included." Id.

The government never alleged the defendant to be a member of or have connection with the Mafia, Cosá Nostra, or any form of organized crime. To hold that the defendant's communications constituted a violation of Section 1510, therefore, clearly stretches the word beyond the intent of Congress. Again, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of leniency". Rewis v. United States, 401 U.S. 808, 812 (1971), quoted and applied in United States v. Bass, 404 U.S. 336, 347-49 (1971); United States v. Dixon, 536 F.2d 1388, 1401 (2d Cir. 1976).

C. "The government failed to prove a necessary element of the crime of Obstruction of Justice, to wit: that the defendant attempted to obstruct, delay or prevent the communication of information ..."

The testimony of both Miss Claire and Mrs. Hopper dove-tailed in one respect, that is, that the defendant told them that "someone" would get in touch with them. (Pp.-172, 183, 213).
No where in the record is there a statement by either Miss Claire or Mrs. Hopper that the defendant told them to in any manner avoid communicating with anyone concerning the investigation of said defendant.

In fact, the witnesses' testimony further paralleled each other in that they stated that it was their personal schedules and personal self-interests which delayed their contacting Postal Inspector Johnson. (P-176, 206). In substance, they each stated that they did not want to get involved, and therefore, it was not the defendant's actions which caused the delay in communicating information by the witnesses to the government agent.

Consequently, it is respectfully requested that the conviction of the defendant for the Obstruction of Justice counts in the indictment be reversed and that the indictment be dismissed upon the grounds that no criminal offense was charged therein, and upon the further grounds that the government's proof on trial failed to make out a case against the defendant.

POINT V

THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS ALL EVIDENCE OBTAINED BY THE GOVERNMENT AT THE JANUARY 23, 1976, MEETING.

The Fifth Amendment of the United States Constitution guarantees every citizen a right against self-incrimination. This privilege can only be waived by a knowing and intelligent waiver. Miranda v. Arizona, 384 U.S. 436, 86 St. Ct. 1602 (1966). The defendant, in supplying culpatory information to the government at the January 23, 1976, meeting, did not make a knowing and intelligent waiver of his right against self-incrimination.

The Supreme Court in Powell v. Alabama, 287 U.S. 45 (1932) established that the Sixth Amendment of the Constitution guarantees the right to effective assitance of counsel. The defendant clearly was denied this right through his initial representation by Harry Sands, Esq.

At the pre-trial hearing on the motion to suppress the evidence, the defendant testified that when he engaged Mr. Sands as his attorney, Mr. Sands represented that he was "... a former Federal Judge and highly experienced in handling federal matters...". (P. 66-67). At the same hearing when Mr. Sands was questioned by Mr. Michelman, defendant's trial counsel, Mr. Sands was asked by whom he was employed to which he responded: "I am retired, a Federal Judge employed by nobody."

The following questions and answers were then propounded by counsel and answered by the witness, Mr. Sands: (P. 46, line 9-p. 48, line 3)

Q. When did you retire as a Federal Judge?

A. 1974.

Q. Was that in the Eastern District of New York that you sat as a judge?

A. I sat all over the country as a judge. I was an Administrative Law Judge. My office was in Jamaica.

Q. Jamaica, Queens?

A. That is right.

Q. As an Administrative Law Judge, what agency did you work for?

A. Social Security.

Q. How long had you done that?

A. I was a federal employee for 33 years. I worked first for the Veterans Administration then I became what was known as a Hearing Examiner for Social Security and worked in Cincinnati. Then I came to New York and was an Administrative Judge for 18 years and the Chief Judge in the Jamaica Office.

Q. Mr. Sands, prior to your being engaged by Mr. St. Clair, how many criminal matters had you handled?

A. Before I went into the Army in 1945 I was engaged in the active practice of law for 15 years. I tried criminal, civil, federal cases, any case you can think of, for 15 years.

Q. How many criminal cases did you try after you retired as a Federal Judge?

A. Since I retired in 1974 I believe I have tried, not in the Federal Court but in the State Court, in the Court of Long Beach, at least 20.

Q. The Court of Long Beach is a local court where the limitations of crime is a misdemeanor, am I right?

A. Yes.

Q. Did you ever try any felony cases?

A. Yes, in the County Court of Queens.

Q. In the County Court?

A. Yes, and a criminal case in Nassau County in Mineola.

MR. MICHELMAN: I would like the Court to take judicial notice that there has not been a County Court in Queens since 1961.

Thus, the record clearly establishes that Mr. Sands was not a federal judge within the laymen's understanding of what a federal judge is, but was an Administrative Judge for the Social Security Administration and further that he had no experience in trying federal criminal cases and that at best, since 1945 he tried no more than 20 cases in State Court and in the City Court of Long Beach which is equivalent to a Magistrate's Court, empowered to try traffic violations and minor misdemeanors.

Accordingly, the defendant was mistakenly lulled into the belief that he was being represented by competent counsel. Mr. Sands' incompetence is obvious and the record clearly indicates this. By virtue of the ineffective assistance of counsel, which violates defendant's Sixth Amendment rights, he did not have sufficient knowledge of his Fifth Amendment rights to make a knowing and intelligent waiver thereof.

Thus, on January 23, 1976 when the defendant and Mr. Sands on one hand, and the United States Attorney and the Postal Inspector appeared before Judge Weinstein for the purpose of the defendant's consent to a temporary restraining order restraining him from further proceeding in his business, the defendant was in a state of mind that he believed that the matter was being completed.

Giving further strength to this argument, Asst. United States Attorney Gould testified at the hearing on the motion to suppress the evidence that in fact Judge Weinstein stated that there was no need for this case to proceed as a criminal matter. (P. 32), The defendant, therefore, believing that the entire matter was about to be closed, proceeded to the Asst. United States Attorney's office with Mr. Sands without the benefit of Mr. Sands consulting with him as to what would take place at the United States Attorney's Office.

Although the government may not have been required to give the defendant his Miranda warnings at the January 23, 1976 meeting, it was clearly Mr. Sands' duty to inform the defendant of his right against self-incrimination. In fact, the evidence establishes that Mr. Sands told the defendant that he had to give the government certain culpatory evidence, viz, the names of the individuals who assisted the defendant in the mailings. (P.-55-56). In addition to those names the defendant either personally, or through his counsel, supplied the names of the printers, a list of the companies to which the mailings had been sent and other information, all of which was ultimately used before the Grand Jury as the key evidence upon which the indictment was founded. Because of this grossly ineffective assistance of counsel, the defendant clearly could not have made a knowing and intelligent waiver of his right against self-incrimination when he furnished that culpatory evidence to the government at the January 23, 1976, meeting.

A further fact which re-enforces the defendant's argument that he did not make a knowing and intelligent waiver of his rights against self-incrimination, is that three (3) days after his meeting at the United States Attorney's Office, to wit: on January 26, 1976, a Consent Agreement was executed between the defendant and the government whereby the defendant agreed to completely refrain from any business related to this commerical directory and the sending and mailing of any solicitations, invoices, etc., in consideration of the government's agreement not to prosecute the defendant under Title 39, U.S.C. Section 3005, the statute specifically referring to the mailing of invoices without notices of solicitation.

It is therefore the defendant's position that by reason of the ineffective assistance of counsel rendered by Mr. Sands, he did not know that the statements which he furnished to the United States Attorney and the Postal Inspector could and would have been used as evidence against him upon a criminal proceeding.

Thus, there was no knowing and intelligent waiver of the defendant's rights against self-incrimination and the motion to suppress the evidence furnished by the defendant to the government which served as the basis for the indictment, should have been granted and the indictment dismissed.

CONCLUSION

By reason of all the foregoing, the judgment of conviction of the defendant E. Garrison St. Clair should be reversed.

Respectfully submitted,

MICHELMAN & MICHELMAN
Attorneys for Appellant
250 West 57th Street
New York, New York 10019
(212) 586-1410

MICHELMAN & MICHELMAN

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 25 day of Jan. ,1977 at No. 225 Cadman Plaza East, Brooklyn, NY

deponent servied the within BRIEF
upon U.S. Atty. East. Dist. of NY

the Appellee herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the atty. for the Appellee therein.

Sworn to before me this
25 day of Jan. 1977

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978